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Wetlands Protection Program Policies

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Department of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street, Boston 02108

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

Gary Clayton, Division Director

ON THE DISTRIBUTION OF DIVISION WETLAND POLICIES

From time to time the DEQE Division of Wetlands and Waterways Regulation issues formal policies interpreting the Wetlands Protection Act (Ch. 131, S.40) and regulations (310 CMR 10.00). Unlike regulations, policies do not have the force of law. Rather, they spell out the criteria DEQE will use in making decisions. This guidance will help avoid appeals and will promote statewide consistency in wetlands decision-making. Note: Policies are numbered sequentially within each year.

The new policies will be published regularly in the Wetland Report, the Division's quarterly newsletter.

PUBLICATION: #14,855-24-200-6-87-CR
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S. RUSSELL SYLVA
Commissioner

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street, Boston 02108

M E M O R A N D U M

TO: Regional Environmental Engineers
Wetlands Program Staff
Conservation Commissions
Office of the General Counsel

FROM: Gary Clayton, Director
Division of Wetlands and Waterways Regulation

DATE: July 11, 1986

RE: WETLANDS PROGRAM POLICY 86-1: 310 CMR 10.03(3) Presumptions For Subsurface Sewage Disposal Systems That Meet Title 5 or More Stringent Local Board of Health Requirements.

The Wetlands Regulations, at 310 CMR 10.03(3), establish a presumption that a subsurface sewage disposal system, which complies with the requirements of Title 5 or more stringent local Board of Health requirements, protects the interests of the Wetlands Protection Act (the "Act"). This presumption, however, only has effect if none of the components of the system are located within certain resource areas protected by the Act, and if the leaching facility of the system is located at least 50 feet from the boundary of those areas, or a greater distance if required by a local Board of Health by-law or regulation. Conservation Commissions and the Department, however, have only limited authority to enforce more stringent local Board of Health requirements because neither has the authority to interpret ambiguous language that may be included in those by-laws or regulations or to determine whether the local Board of Health should grant a variance from the local standards. Therefore, the Department adopts the following guidelines for applying the provisions of 310 CMR 10.03(3):

(1) When reviewing a Notice of Intent, a Conservation Commission or the Department must determine whether a proposed sewage disposal system meets the fifty foot wetland set-back requirements of 10.03. Usually, Title 5 issues other than wetlands set-backs should be left to the Board of Health unless there is overwhelming evidence that the Board of Health has failed to properly review the case. The Title 5 requirements that may be considered are limited to those, such as the requirements for "perc" tests, where a system not in compliance would have the potential to impair resource areas identified in 10.03(3). It is highly unlikely, therefore, that a standard

such as a lot-line set-back requirement should ever be considered in a wetlands review.

(2) As stated above, neither a Conservation Commission, nor the Department have the authority to interpret Board of Health regulations or to decide whether a local Board of Health will issue a variance from its own regulations. Where a proposed project meets the requirements of Title 5, but may fail to meet more stringent local standards, the Conservation Commission and the Department have two recommended alternative courses of action:

a) Where it is clear that the system does not meet the local Board of Health requirements, such as when the Board of Health has already denied a request for a permit, the Conservation Commission or the Department could deny the project and require the applicant to obtain a permit from the local Board of Health prior to the issuance of an Order of Conditions. Suggested wording for such a denial is:

> "This project is denied because it does not meet the setback requirements of the [Town Name] Board of Health and therefore does not have the benefit of the presumption under 310 CMR 10.03. A new Notice of Intent may be filed if the [Town Name] Board of Health issues a permit, or the project is revised to meet the [Town Name] Board of Health requirements."

Conservation Commissions and the Department must be careful when using this alternative. Many Boards of Health simply will not take any action before the issuance of an Order of Conditions. It would not be proper, therefore, to create a situation where the applicant is placed in the impossible position of having neither approval available until the other is obtained.

b) If the only question about the permissibility of the proposed work is whether it will receive a local Board of Health permit, it is generally preferable for the Conservation Commission or the Department to issue an Order of Conditions that will permit the work on the condition that the applicant subsequently receives a local Board of Health permit. Suggested wording for such a condition is:

> "No work permitted by this Order may begin unless and until the applicant receives a subsurface sewage disposal permit from the ['town name'] Board of Health, and until a copy of said permit is sent to the Conservation Commission and the Department."

The Conservation Commission or the Department are responsible for making the wetland boundary delineation for the Board of Health to use in its review. Generally, this delineation will take place when the applicant's plans have been reviewed and found accurate, or modified in accordance with the findings of the Conservation Commission or the Department.

S. RUSSELL SYLVA
Commissioner
WILLARD R. POPE
General Counsel

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
One Winter Street, Boston 02108
Office of General Counsel, Tel. 292-5568

MEMORANDUM

TO: Regional Environmental Engineers
Wetland Protection Program Staff
Legal Office

THROUGH: Gary Clayton, Director

FROM: Matthew Watsky, Assistant General Counsel MW

DATE: November 26, 1985

SUBJECT: Wetlands Protection Program Policy 85-5
Enforcement Orders, Appeal Language

This memorandum is to clarify the procedures for the appeal of Enforcement Orders. The questions to be addressed are whether Conservation Commission Enforcement Orders are appealable through the DEQE administrative process or only to a court; and who may appeal Enforcement Orders issued by the Department.

First; Conservation Commission Enforcement Orders are not appealable to the Department. They can only be appealed to the Superior Court.

Second: the Department's Enforcement Orders are appealable through the administrative process. But the individuals who have standing to raise such an appeal are different from those who may appeal the Department's Superseding Orders.

The Wetlands Protection Act Regulations, in 310 CMR 10.05(7)(j), provide that Superseding Orders and Superseding Determinations may be appealed for an adjudicatory hearing by any person specified in 10.05(7)(a). Thus, each Superseding Order issued by the Department includes the standard appeal paragraph.

The regulations regarding the Department's Enforcement Orders set forth in 10.08, however, do not refer to 10.05(7)(a). Thus, appeals from the Department's Enforcement Orders are not available to all of the potential appellants listed in 10.05(7)(a). Only those individuals who fit the definition of a "party" found in the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.01(2)(c)(5) may appeal one of the Department's Enforcement Orders..

The attached form contains appropriate wording for the Department's Enforcement Order appeal paragraphs.

MW/mea
1088A

☐ Completed application forms and plans as required by the Act and Regulations shall be filed with the _____ on or before _____ (date), and no further work shall be performed until a public hearing has been held and an Order of Conditions has been issued to regulate said work. Application forms are available at: _____.

☐ The property owner shall take every reasonable step to prevent further violations of the act.

☐ Other (specify)

Failure to comply with this Order may constitute grounds for legal action. Massachusetts General Laws Chapter 131, Section 40 provides:

> Whoever violates any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months or both. Each day or portion thereof of continuing violation shall constitute a separate offense.

Questions regarding this Enforcement Order should be directed to: _____

Issued by _____

Signature(s) _____

_____ _____

_____ _____

_____ _____

_____

(Signature of delivery person
or certified mail number)

Hearing Rights

You are hereby notified of your right to an adjudicatory hearing under the Massachusetts Administrative Procedure Act, G.L. c. 30A, §10, regarding this Enforcement Order. In accordance with the Department's Rules for the Conduct of Adjudicatory Proceedings, 310 CMR 1.01, a Notice of Claim for Adjudicatory Hearing must be filed in writing within twenty-one (21) days of the date of issuance of this Enforcement Order; must state clearly and concisely the facts which are grounds for the proceeding and the relief sought; and must be addressed to:

Docket Clerk
Office of General Counsel
Department of Environmental Quality Engineering
One Winter Street

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

MEMORANDUM

TO: Regional Environmental Engineers
Wetlands Protection Program Staff
Legal Office

FROM: Meriel Hardin, Acting Director

DATE: September 17, 1985

SUBJECT: Wetlands Protection Program Policy 85-4
Procedures for Amending an Order of Conditions

Following the issuance of an Order of Conditions, circumstances sometimes arise, such as subsurface conditions encountered upon commencement of construction or requirements of other state or local permits issued subsequent to the Order, that may require modifications of the plans approved in that Order. To allow for the smooth operation of the permitting procedure and to avoid unnecessary and unproductive duplication of regulatory effort, the Department recognizes that it would not be reasonable to require a complete refiling of the Notice of Intent when the changes sought in the Order of Conditions are relatively minor and will have little or no impact on the interests protected by the Act. Thus, the process of amending an Order of Conditions is acceptable to the Department as long as certain procedural safeguards are employed.

In processing an amendment to an Order of Conditions, the Department recommends that the following procedures be used for all but the most simple changes, such as correcting obvious mistakes or typographical errors:

1) The applicant should make a request for an amendment to the conservation commission either orally at a regularly scheduled meeting of the commission or by submitting the request to the commission in writing. In either case, a written copy of the request should also be forwarded to the Department's regional office.

2) The conservation commission first makes a determination whether the requested change is substantial enough to warrant the filing of a new Notice of Intent or whether it is of a relatively minor nature and can be considered as an amendment to the original Order of Conditions. In making this determination, the commission should consider such factors as whether the purpose of the project has changed substantially, whether the scope of the project has increased substantially and whether the potential for adverse impacts to the protected statutory interests will be increased substantially.

3) If the commission determines that a new Notice of Intent is not necessary, the commission should publish newspaper notice (at the applicant's expense) in the same general manner as outlined in the Act for new Notices of Intent and as required by the Open Meeting Law, G.L. c. 39, S 23B, to inform the public that the request for amendment to the Order of Conditions will be considered by the commission at a public hearing.

4) If, after considering the information presented by the applicant and any comments received at the public hearing, the commission decides to issue an amended order of conditions a copy of such order should be forwarded to the Department's regional office at the time of issuance. By analogy to the normal appeal procedure of the original Order of Conditions, a person aggrieved by the changes made to the amended order, or the other parties given appeal rights by the Act, may, within ten days of issuance, request that the Department review the changes made to the original Order of Conditions. In that case, until there is a final resolution of the appeal no work may continue on those portions of the project not permitted under the original Order of Conditions but only permitted by the amendment(s) which has been appealed.

MH/mes

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

MEMORANDUM

TO: Regional Environmental Engineers
Wetland Program Staff
Legal Office

FROM: Roderick Gaskell, Director

DATE: January 24, 1985

SUBJECT: WETLAND PROGRAM POLICY 85-2
INTERPRETATION OF 310 CMR 10.57(2)(b)
DEFINITION OF ISOLATED LAND SUBJECT TO FLOODING

"Land subject to flooding" has been divided in the regulations into two different types of areas, those which flood as a result of water rising from creeks, ponds, rivers, or lakes, and those which flood due to ponding of run-off or high ground water. See generally 310 CMR 10.57. The characteristics of these different types of areas are defined in 310 CMR 10.57(2). The interests served by these areas are set forth in the discussion section and the performance standards, §§10.57(1) and 10.57(4) respectively.

One of the principal purposes of the explicit definition of isolated land subject to flooding ("ILSF") is to differentiate between those areas that serve these interests in a significant way and areas where small amounts of water may collect occasionally--puddles, in effect. A second purpose is to distinguish between those areas that are important parts of a larger water resource system--for which the cumulative effects of even small fillings can lead incrementally to serious flooding problems over the entire floodplain--and those that are only locally significant to the interests of storm damage and flood prevention. By making these distinctions, the regulations provide an appropriate degrees of protection to land areas that function in different ways. A third purpose is to ensure consistent application of the distinctions by regulators across the state, providing a greater degree of certainty for land owners with regard to the standards of review they should expect.

Unfortunately, there has been some confusion as to the interpretation of the definition of an ILSF, reducing the degree to which consistent administration has been achieved. As in certain other areas of the regulations (see, e.g. Wetland Policy Memorandum 85-1), the selection of numerical criteria in an effort to provide specific guidance has raised subsidiary technical questions that were not critical when the standards for determining jurisdiction were less clearly defined. This memorandum will set forth, for the guidance of land owners, developers, and regulators, the Department's interpretation of specific portions of its regulations defining an ILSF.

(1)"An isolated depression or closed basin without an inlet or an outlet". The phrase "without an inlet or an outlet" is not intended as a literal exclusion of all sources of flow, chanelized or otherwise, into a basin. Obviously, any basin must have an "outlet" of some kind at some elevation, at which the basin would be overtopped; similarly, there must be some flow of water into the basin (whether through ground or surface water) if there is any accumulation. In the context of this definition, "inlet" is intended to refer only to a hydrologic connection with the 100-year flood event on a water-body; that is, "inlet" is only used to distinguish ILSF from a bordering land subject to flooding, which has such a hydrologic connection. A different set of performance standards, appropriate to the flood storage function within the larger system, applies to the bordering land subject to flooding. Thus, a basin which receives a channelized flow generated by run-off may constitute an ILSF, if the remaining elements of the definition are met, even though such a channel could be termed an "inlet" in some sense. Similarly, the existence of an "outlet" at a certain elevation does not preclude a finding that a basin constitutes an ILSF, if the requisite volume of water is confined within the basin below that elevation.

(2)"An area which at least once a year confines standing water ...". "At least once a year" refers to a statistical event with a one-year return period, and is not dependent on direct annual observations and measurements of volumes confined within a specific basin. The observation that the requisite volume of water was or was not confined within a specific basin in a particular year is not conclusive, though of course in may be relevant, to a determination that the basin is or is not an ILSF. The methodology of the calculations should be consistent with that described in §§10.57(2)(b)(3) and (a)(3), except that the calculation should be based on a 24-hour event with a one-year return period.

(3)Boundary of ILSF. The boundary of an ILSF is defined in §10.57(2)(b)(3) as the largest observed or recorded volume of water confined within the area. In the event of dispute, calculations regarding the extent of the 100-year flood event, are used to determine the probable extent of such water. The lateral boundary of the ILSF is the area that will be inundated

during that event. As indicated above, if there is an outlet at a given elevation such that water will not be confined within the basin above that elevation, the outlet elevation should generally represent the boundary of the area (unless water will continue to be contained above that elevation despite the presence of an outlet). Thus, the boundary of the ILSF is either the elevation at which retained waters reach an "outlet" and flow out of a ILSF basin, or the area of inundation resulting from a 100-year storm if there is no such outlet. The calculations should assume that the surface of the ILSF basin is impervious, but should use standard methodologies to account for infiltration within the contributing watershed based on the relative proportions of previous and impervious surfaces .

It is important to note that two sets of calculations may be relevant for determining the existence and extent of an ILSF. First, the 1-year storm calculation is a threshhold determination of jurisdiction. If the calculations show that the requisite volume of water is confined within a particular basin, the basin is an ILSF. Second, in making a boundary determination for areas that meet or exceed the threshhold, the 100-year storm calculation or the location of an outlet may be used. In both cases, the calculations should assume no infiltration within the ILSF basin itself, but may make standard assumptions with respect to infiltration within the contributing watershed.

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S. RUSSELL SYLVA
Commissioner

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
One Winter Street, Boston 02108

MEMORANDUM

TO: Regional Environmental Engineers
Wetland Program Staff
Legal Office

FROM: Roderick Gaskell, Director

DATE: January 24, 1985

SUBJECT: WETLAND PROGRAM POLICY 85-1
INTERPRETATION OF 310 CMR 10.55(2)(c)
VEGETATION "IDENTIFIED IN THE ACT"

The definition of Bordering Vegetated Wetlands is found at 310 CMR 10.55(2). In part, that definition provides that "[t]he boundary of Bordering Vegetated Wetlands is the line within which 50 percent or more of the vegetational community consists of the wetland plant species identified in the Act". The reference is to the plant species identified in numerous paragraphs of M.G.L. c. 131 §40 in which various types of bordering vegetated wetlands (e.g. bogs, swamps, wet meadows, marshes) are defined by vegetational communities. In each of the statutory definitions, a list of plant species and genuses is preceeded by a phrase that is essentially equivalent to the following: "a significant part of the vegetational community is made up of, but not limited to nor necessarily including all, of the following plants or groups of plants."

Difficulty in intrerpreting this language has been compounded by the fact that the lists of plants and groups of plants are not exhaustive. The lists omit some species that are generally recognized as excellent wetlands indicators, that is, plants that grow exclusively (or nearly so) in wetlands. The lists also include some species that are poorer indicators than some of the species omitted. Prior to the adoption of §10.55, this issue was not crucial because the regulations did not contain a numerical interpretation of the phrase, "a significant part of the vegetational community". In locations where indicator species that were not listed by name were present, species that were specifically listed were also likely to be present, and jurisdiction over the area was often established.

Because §10.55(2)(c) establishes a numerical limitation, it has become essential to interpret the statutory language defining wetlands areas. The Department therefore interprets the statutory phrase "not limited to" as incorporating plant species or groups similar to those listed by name, insofar as such non-listed species or groups are at least as likely as those specifically named to indicate wetlands. Such plants serve essentially the same wetland functions as those listed by name, and thereby serve the interests of the Act in essentially the same manner. The Department believes that the legislature did not intend to limit the definition of wetlands to the technical knowledge then available, that the legislature intended that plants exhibiting similar characteristics to those identified should be considered, and that the legislature employed the words "not limited to ... the following plants or groups of plants" to indicate this intention. Accordingly, plants generally accepted as indicative of wetlands, and identified as such in generally accepted scientific or technical publications, may be considered to be wetland plant species "identified in the Act" in determining the boundary of bordering vegetated wetlands.

It is important to recognize that the hydrologic and topographical elements of the definition of bordering vegetated wetlands, set forth in the Act and in §10.55(2)(a) and (b), must still be satisfied. These requirements are unaffected by this interpretation.

Document 0048W

Recommended Procedures for Enforcement of the Wetlands Protection Act, Mass. G.L. Ch. 131 s.40 for Conservation Commissions

Massachusetts Dept. of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street
Boston, MA 02108
(617) 292-5695

Massachusetts Dept. of the Attorney General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108
(617) 727-2265

In 1972 the Wetlands Protection Act ("the Act") was amended to give the conservation commission the initial responsibility for the administration of the statute. In addition to issuing regulatory Determinations of Applicability, Orders of Conditions, Extensions and Certificates of Compliance, a conservation commission is in an excellent position to take enforcement actions. We recommend the following enforcement procedures to help conservation commissions obtain compliance with the Act.

Step 1. Determination of a violation and site inspection

Failure to comply with a Determination of Applicability or an Order of Conditions and work in areas subject to the Act without a valid Order of Conditions constitute violations of the Act. Violations can include, among others, the failure to file a Notice of Intent, to observe a particular condition or time period specified in a Determination or Order, to record an Order in the Registry of Deeds or to obtain an Extension Permit. The DEQE and conservation commissions are equally authorized and responsible for enforcing the Wetlands Protection Act. This means that:

A. A conservation commission, at its discretion, can enforce a DEQE Order. The DEQE regional office should be notified as quickly as possible of any violations of Superseding Orders. If DEQE supports enforcement actions by the conservation commission, but is unable to respond quickly enough or at all, the commission should proceed promptly with its own enforcement action.

B. The DEQE, at its discretion, can enforce a conservation commission Order. The State may take enforcement action if the person requesting such action has reasonably documented improper or no action by the commission, or if requested to act by the commission for good cause. DEQE encourages commissions to enforce their own Orders.

C. Both DEQE and the conservation commission can pursue a violation where work is being done in an area subject to the Act without a valid Order.

Commissioners or their agents, upon learning of a violation, should promptly visit the site, take pictures and record relevant data such as location, the names of equipment operators, pertinent license plate numbers, the estimated type and amount of fill, water levels, etc. Photographs should show the extent and type of violation and have the time, date and location legibly written on the back along with the photographer's name, address and phone number.

Conservation commission members, their agents, officers and employees have the right to enter upon open fields, woods and wetlands without a warrant to carry out their statutory responsibilites; however, it is good policy to contact the property owner or the person in charge of work at the site before entering onto the land to give notice of the site inspection. Because some property owners are not aware of this inspection authority, commission members may find it appropriate on occasion to be accompanied by a police officer when inspecting a site.

Step 2. Request for Compliance and Enforcement Order

Depending on the extent and seriousness of the violation, the conservation commission may decide to proceed with varying degrees of formality.

A. Request for Compliance

If the violator is simply unaware of the law and will comply once notified, an informal verbal request for compliance might be made before issuing an Enforcement Order.. Or, if no activity is taking place at the moment, but illegal activities have taken place, a a letter requesting compliance may be suitable. If no response is made, an Enforcement Order should then be sent. It is essential to document each action taken.

B. Enforcement Order

If no response is made to the request for compliance or if work is taking place and there is an immediate need to stop the activity, the conservation commission should issue an Enforcement Order. See Form 9 in the Wetlands Regulations (310 CMR 10.99). An Enforcement Order constitutes a formal notice of violation and must be signed by a majority of the commission. In a situation requiring immediate action, an Enforcement Order may be signed by a single member or agent of the commission if the Order is ratified by a majority of the members at the next scheduled meeting of the commission. The Enforcement Order should be delivered by a reliable method such as certified mail (return receipt requested) or hand delivery. Police officers are sometimes used to deliver them.

Step3. Court action by local authority

If a violator ignores the Commission's Enforcement Order, the conservation commission should seek judicial enforcement.

A. Civil Action

Ask Town Counsel or the City Solicitor to file a Complaint in Superior Court on behalf of the municipality against the violator of the Act. When the commission believes that Town Counsel or the City Solicitor is not enthusiastic about enforcing the Act, the request should be made in writing setting forth the reasons court action is warranted and a date by which you would like the complaint filed. A realistic time

span within which the town's or city's attorney should file the Complaint is 10 days to 2 weeks. In cases where continuation of the activity will cause irreversible harm, ask Town Counsel to file a Complaint immediately.

In situations involving valuable wetland resources where serious, irreversible alterations are occurring, Counsel should be asked to seek a Temporary Restraining Order. A T.R.O. can be issued immediately, without notice to the violator. It remains in effect no more than 10 days, however, and the parties must appear in court to have a T.R.O. extended to a Preliminary Injunction, which continues until trial.

A Complaint which remains unresolved leads to a trial. Since a full trial could be delayed in many counties because of crowded court dockets, counsel should be asked to seek a Preliminary Injunction from the Court which orders an immediate halt of all illegal wetlands alterations on the subject property. Obtaining a Preliminary Injunction can involve several days because the defendant must be given notice and an opportunity to appear in court.

Both a Preliminary Injunction and a Temporary Restraining Order can be requested only in conjunction with the filing of a Complaint. Model Complaints are available from the Attorney General's Office if needed by Town Counsel or City Solicitor.

To file a Complaint, Counsel for the municipality will have to be able to demonstrate that a violation has occurred. Therefore, the commission should provide him/her with the following:

1. Photographs;

2. Statement(s) from commission members or others who have observed the violation, incorporating the labeled photographs and authenticating them as a "fair and accurate representation" of the property as they saw it; and

3. Copies of the Enforcement Order and any other relevant correspondence.

B. Criminal Action

While a civil action is more appropriate for achieving remedial results such as the restoration of a site, criminal action is better suited for achieving punitive results (fines or imprisonments). In cases of flagrant violations, commissions may wish to proceed in criminal court. A sympathetic District Court can be helpful to the wetlands protection efforts of a conservation commission.

A criminal action may be initiated by any person, including the conservation commission. The action is initiated by submitting to the Clerk of Court a statement of the violation which specifies the:

1. type and extent of the violation;

2. name and address of the violator;

3. location of violation:

4. date of violation; and

5. statute which has been violated (G.L. ch. 131, § 40).

Indicate that this statement has been approved by vote of the conservation commission and include names and addresses of witnesses to the violation plus clearly identified photographs. Also include the Enforcement Order and any other relevant documentation.

Step 4. State assistance in enforcement

If Town Counsel or the City Solicitor fails to respond to the written request of a conservation commission for legal enforcement action, or if the conservation commission is unsuccessful in enforcing a State Superseding Determination or Order, the commission can seek help from the State. A letter requesting support in an enforcement action should be sent to the DEQE Regional Environmental Engineer with a copy to the Environmental Protection Division of the Department of the Attorney General. Complete documentation including copies of the Enforcement Order and correspondence with counsel should be enclosed. When requesting this assistance, it is important that the commission demonstrate that it has made every effort to deal with the problem at the local level.

There are a number of factors that the State will take into consideration in deciding whether or not to pursue enforcement action, including the seriousness of the violation, the degree of environmental harm, the likelihood of preventing future violations, the availability of enforcement resources and the probability of achieving a successful result. If DEQE determines litigation is necessary, the case will be referred to the Attorney General's Office. Such referral means that, should no settlement be reached, conservation commission members and other local officials are prepared to do the work required to go to court.

Anthony D. Cortese

ANTHONY D. CORTESE, Sc.D.
Commissioner
Department of Environmental
Quality Engineering

Stephen Leonard

STEPHEN LEONARD
Chief, Environmental Protection
Division
Department of the Attorney General

June 26, 1984
DATE

ANTHONY D. CORTESE, Sc. D.
Commissioner

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Wetlands Protection
One Winter Street, Boston 02108
(617) 292-5519

MEMORANDUM

TO: Northeastern and Southeastern Regional Engineers and Coastal Wetlands Staff

FROM: Roderick Gaskell, Director R.G.
Division of Wetlands Protection

DATE: February 24, 1982

SUBJECT: Variance and Salt Marsh Policies, Coastal Wetlands Regulations (Policy No. 82-1 and 82-2)

Attached for your information and for filing in your policy notebooks are two new policies which further clarify the Coastal Wetlands Regulations. Policy no. 82-1 sets forth the standards for issuance of a variance. Policy no. 82-2 makes it clear that section 32(5) of the Coastal Wetlands Regulations, which provides for the restoration or rehabilitation of salt marsh, does not permit the destruction of salt marsh even if compensatory measures are proposed.

RG:cam

CC: D. Fierra, Deputy Commissioner
CZM

ANTHONY D. CORTESE, Sc. D.
Commissioner

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Wetlands Protection
ONE Winter Street, Boston 02108

M E M O R A N D U M

TO: Regional Environmental Engineers
Wetland Program Staff
Legal Office

FROM: Roderick Gaskell, Director RG

DATE: February 16, 1982

SUBJECT: WETLANDS PROGRAM POLICY 82-1
STANDARDS FOR ASSESSING A REQUEST
FOR A VARIANCE UNDER SECTION 36
OF THE COASTAL WETLANDS REGULATIONS, 310 CMR 10.36.

Section 36 of the Regulations for Coastal Wetlands, 310 CMR 10.36, provides:

> The Commissioner may waive the application of any regulation in Part II when he finds, on the basis of and following an adjudicatory hearing, that such variance will provide the same degree of protection of the interests of the Act as application of these regulations and that the variance is necessary to accommodate an overriding community, regional, state or national public interest.

As required by Section 36, in order to grant a variance the Commissioner must find based on an adjudicatory hearing that: (1) the alternative for which the variance is requested provides protection to the interests of the Act equal to that provided by the applicable coastal regulation; (2) the project serves an overriding community, regional, state or national public interest; and (3) the variance is necessary in order to accommodate the particular public interest served by the project.

On April 7, 1981, the Commissioner issued the first decision under this section in the case of DEQE Wetlands File No. 35-52, Hull (Nantasket Associates - Bay View Towers). In that decision, the Commissioner outlined the three criteria to be evaluated in determining whether to grant a variance and provided guidance on how these criteria

would be applied in future cases. Although no one but the Commissioner is empowered to grant a variance under Section 36, it is important that the Wetlands Staff be aware of the applicable standards since they will have to advise the Commissioner on future variance requests as well as respond to inquiries by applicants, Conservation Commissions, and the general public. Thus, what follows is an explanation of each of the variance criteria which the Department will consider in evaluating a request for a variance.

For the first requirement - the provision of protection equal to that provided by the regulations - the resource area impacted must be identified, along with the interests of the Act protected by that resource area. Then, the applicant for the variance must demonstrate that the alternative applicable means of protection will protect the interests of the Act to the same degree as the coastal regulations, and the alternative must be real, specific, permanent and enforceable.

Whether the second requirement - the service of an overriding public interest - has been satisfied requires a finding that the project be constructed by or under the auspices of a public authority or a private entity found to be serving a public function. In addition, for the project to satisfy the overriding public interest requirement, the public interest project must be one of unusual merit in order to override the applicable coastal regulation.

As for the third requirement - the necessity for the variance - there must be a showing that the nature of the project is such that it cannot be constructed so as to accommodate the overriding public interest unless a variance is granted. In making this showing, consideration should be given to alternative project locations and designs, including divisable segments, size, and site plans. The inquiry into alternatives need not be limited to modifications of the project as originally proposed by the applicant, but shall explore other reasonable options and alternatives which could avoid non-compliance with the applicable coastal regulation, including alternative means of satisfying the overriding public interest unrelated to the original proposal.

As stated in the commentary to Section 36, the variance provision is intended to be employed only in rare and unusual cases, and the applicant requesting the variance has the burden of satisfying each element of the three requirements. Moreover, the mere satisfaction of these minimum requirements does not mandate the granting of a variance, for Section 36 provides that the Commissioner <u>may</u> waive the application of any regulation in Part II. Consequently, the ultimate variance decision is subject to the descretion of the Commissioner, even if the findings required by Section 36 are resolved in favor of the applicant requesting the variance. In exercising his discretion, the Commissioner will consider applicable administrative and executive orders, including the policies embodied in the Massachusetts Coastal Zone Management Program.

ANTHONY D. CORTESE, Sc. D.
Commissioner

The Commonwealth of Massachusetts

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M E M O R A N D U M

TO: Regional Environmental Engineers
Wetland Program Staff
Legal Office

FROM: Roderick Gaskell, Director R.G.

DATE: February 16, 1982

SUBJECT: WETLAND PROGRAM POLICY 82-2
APPLICABILITY OF SECTION 32(5)
OF THE COASTAL WETLANDS
REGULATIONS, 310 CMR 10.32(5).

The general performance standard applicable to projects affecting a salt marsh is Section 32(3) of the Regulations for Coastal Wetlands, 310 CMR 10.32(3), which states, in part:

> A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh.

Section 32 (5) of the regulations, 310 CMR 10.32(5), modifies that regulation and provides:

> Notwithstanding the provisions of Section 32(3), a project which will restore or rehabilitate a salt marsh, or create a salt marsh, may be permitted.

This latter section is applicable only to projects, the primary purpose of which is the restoration, rehabilitation or creation of a salt marsh, but the accomplishment of which may involve minor or temporary adverse effects on portions of the existing marsh. It does not permit the destruction of a salt marsh incidental to construction in coastal areas even if compensatory measures are proposed by the applicant.

Thus, for coastal projects which are proposed for purposes other than salt marsh restoration, rehabilitation or creation, and which would destroy a salt marsh, or a portion thereof, Section 32(3) would apply even if measures, such as relocation of the salt marsh or creation of a new salt marsh, were proposed in an attempt to compensate for the destruction of the marsh. Section 32(3) requires the issuance of an Order of Conditions prohibiting the destruction of a salt marsh in these situations; although under Section 36, the applicant may request a variance from the Commissioner if the project meets the applicable standards.

A Guide to the Coastal Wetlands Regulations

of the Massachusetts Wetlands Protection Act (G.L. 131, s.40)

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The reprinting of this publication was made possible by the Cooperative Extension Service, University of Massachusetts

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This publication is for sale at $4 00 per copy Make checks payable to Massachusetts Cooperative Extension Service, and send them to the Bulletin Center, Cottage A, Thatcher Way, University of Massachusetts, Amherst, MA 01003

The preparation of this publication was funded by the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under a program implementation grant to the Commonwealth of Massachusetts

Issued by the Cooperative Extension Service, Ross S Whaley, Director, in furtherance of the Acts of May 8 and June 30, 1914; University of Massachusetts, United States Department of Agriculture and County Extension Service cooperating R 4/79 1000

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